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May 19, 2014

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, D.C. 20554

Electronically Filed

Re: CC Docket No. 95-116; WC Docket No. 07-149; WC Docket No. 09-109

Dear Ms. Dortch:

I write on behalf of Neustar, Inc., in response to the May 9, 2014, ex parte letter submitted by Ericsson,[1] and to follow up on my earlier letters addressing the procedures the Commission should follow in designating the Local Number Portability Administrator(s) ("LNPA").

We make three points below. *First*, Ericsson's continued insistence that the Commission can designate an LNPA without issuing a Notice of Proposed Rulemaking ("NPRM") reflects a fundamental disregard for the law. No lesser authority than the Supreme Court of the United States has expressly recognized that the Commission's exercise of authority under § 251(e) constitutes rulemaking. *Second*, Ericsson's effort to relegate the Commission's rule barring the selection of telecommunications network equipment manufacturers and their affiliates to a historical footnote is similarly hollow. The Commission's rules expressly mandate use of the process followed in selecting the LNPA, including the neutrality criteria and processes spelled out in Section 4 of the 1997 Selection Working Group report.[2] *Third*, Ericsson's effort to wrap a veil of secrecy around the NANC recommendation and block public participation in the LNPA selection process betrays its unwillingness to compete in a fair and open competitive process. Taken together, Ericsson's repeated calls for the Commission to short-circuit the lawful process

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[1] Telcordia Technologies Inc., d/b/a iconectiv ("Telcordia"), is a part of Ericsson; unless context dictates otherwise, we refer to the entity as "Ericsson."

[2] NANC LNPA Selection Working Group Report (Apr. 25, 1997) ("1997 Report").

makes it imperative for the Commission to ensure that all stakeholders have a meaningful opportunity to evaluate and comment on the NANC's recommendation.

1. **An NPRM Is Mandatory:** The Supreme Court of the United States has recognized that "[s]ection 251(e), which provides that 'the Commission shall create or designate one or more impartial entities to administer telecommunications numbering,' *requires* the Commission to exercise its *rulemaking* authority . . . ." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 383 n.9 (1999) (second emphasis added). This leaves little room for interpretation. As Neustar explained in its letter of May 6, 2014, the Commission originally designated Neustar's predecessor (Lockheed Martin) through a process that began with a Notice of Proposed Rulemaking and culminated with an amendment to the Code of Federal Regulations. The resulting designation – including the 1997 Report and the designation of Lockheed Martin as LNPA – was published in the Federal Register as a "Final Rule[]" and subsequently codified in 47 C.F.R. § 52.26(a). The Commission cannot change its rules without a new NPRM.[3] Ericsson has offered rhetoric but no legal authority to support its assertion to the contrary.

Ericsson continues to assert that the LNPA selection is a "classic adjudication." Ericsson, however, ignores the "central distinction" between rulemaking and adjudication. Unlike adjudication, which retrospectively determines the rights of a named party under established rules, the designation of the LNPA has prospective legal consequences for thousands of stakeholders who are required to provide – and to pay for – number portability.[4] By definition, it is not an adjudication, classic or otherwise, but a quasi-legislative determination under 47 U.S.C. § 251(e).

Ericsson's argument rests almost exclusively on a misreading of *Goodman v. FCC*, but that case is simply inapposite. First, it did not involve the designation of a numbering administrator pursuant to section 251(e), which *requires* the Commission to commence a rulemaking. Second, Ericsson ignores the substantive distinction on which the case turned: a rulemaking is formulation, modification, or amendment of an agency statement that has prospective, rather than retrospective, effect. *See id.* at 994; *see also* 5 U.S.C. § 551(5). In *Goodman*, as the D.C. Circuit stated, the petitioner sought a *temporary waiver* of the Commission's rules for a defined set of parties in specific circumstances and licenses that had already been issued. *See Goodman*, 182 F.3d at 994. The FCC Order challenged in *Goodman*

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[3] *See* Letter from Aaron M. Panner to Marlene H. Dortch, Secretary, FCC, CC Docket No. 95-116, WC Docket No. 07-149, WC Docket No. 09-109, at 4-5 n.20 (filed May 6, 2014) ("May 6 Ex Parte").

[4] *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216–17 (1988) (noting that the "central distinction" between rulemaking and adjudication is that rules have legal consequences "only for the future") (Scalia, J., concurring), *cited in Goodman v. FCC*, 182 F.3d 987, 994 (D.C. Cir. 1999).

did not seek to amend an existing rule and had a retrospective effect that led the Court "to conclude the proceeding was not a rulemaking." *Id.*

Because *Goodman* did not involve a prospective order of general effect and application, it made sense to ask whether any of the procedures that the Commission followed (i.e., notice and comment, publication in the Federal Register) took the decision out of the realm of adjudication.[5] Here, the LNPA designation process modifies an existing rule and will have general prospective effect, thus resulting in legal consequences "only for the future." *Bowen*, 488 U.S. at 216-17 (Scalia, J., concurring).[6] The LNPA designation process is, and has always been, a rulemaking.[7]

Contrary to Ericsson's repeated assertion, the substitution of Neustar for Perot Systems in 1998 does not support its argument that the designation decision was adjudicative. To the contrary, the *existing* rules contemplated and permitted the substitution of one of the two designated LNPAs for the other in the event of "vendor failure."[8] Because Neustar was already designated as LNPA, no additional rulemaking was required to authorize its substitution for Perot Systems in those regions where Perot Systems failed to perform. It is for this very reason that it would be unlawful to authorize or designate a new LNPA without an NPRM proceeding.[9]

Under the law, the Commission's obligations are mandatory, and Ericsson's claim (at 6) that the NPRM procedure is too "rigid[]" is beside the point. It is also without legal merit. Ericsson's own self-interests might well be served by insulating the NANC's recommendation from public comment, but the law and the public interest would not be. The opportunity for

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[5] In fact, as the court noted, "[t]he manner in which the Commission conducted the proceeding revealed its adjudicatory nature as well." *Goodman*, 182 F.3d at 994. The opposite is true in this case, where the Commission proceeded by publishing a notice in the Federal Register, seeking comment, adopting the LNPA selection recommendation as a rule, publishing the selection decision in the Federal Register as a rule, and incorporating the designation into the Code of Federal Regulations.

[6] *See* Letter from Aaron M. Panner to Marlene H. Dortch, Secretary, FCC, CC Docket No. 95-116, WC Docket No. 07-149, WC Docket No. 09-109, at 1-5 (filed Apr. 23, 2014) ("Apr. 23 Ex Parte"); May 6 Ex Parte, at 5-6 n.24.

[7] *Adams Telecom, Inc. v. FCC*, 997 F.2d 955 (D.C. Cir. 1993), provides no support for Ericsson's claim that the Commission's prior designation of the LNPA was not a rulemaking. *Adams* involved the adjudication of an application for a pioneer's preference.

[8] 1997 Report § 6.3.5.

[9] *See United States Telecom Ass'n v. FCC*, 400 F.3d 29, 39-40 (D.C. Cir. 2005) (agency cannot change existing rule without complying with the APA's NPRM requirement); *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003) (same).

public participation is legally required. Transparency and public participation are also required to ensure that important legal, operational, and public policy issues at stake in this proceeding are fully addressed. For example, only an NPRM will remedy the fact that, to date, no more than a handful of stakeholders have had the opportunity to review the NANC's recommendation. Only a transparent NPRM process will ensure that thousands of directly affected stakeholders have the information they need to evaluate and comment on the implications of the NANC recommendation. Furthermore, to circumvent the required regulatory process will deprive all of the affected and interested parties of a voice in this important decision. Moreover, legally mandated procedures are not inconsistent with prompt action. The Commission's prior designation of the LNPA was achieved expeditiously – after the NANC's recommendation in April 1997, an NPRM was filed in the Federal Register in May, and the rule designating the LNPAs was published in the Federal Register in September.[10]

Ericsson's half-hearted suggestion that the Commission can evade the APA's NPRM requirement by relying on a statutory exception has no merit. First, because the NPAC contract is a private contract, not a "public . . . contract," the exception in 5 U.S.C. § 553(a)(2) does not apply.[11] And Ericsson's suggestion that it would be impractical for the Commission to issue an NPRM ignores the fact that the Commission has acted in precisely that manner in other similar situations in the past. In any event, because the Commission designated Neustar as LNPA by rule published in the Federal Register after a Federal-Register-published NPRM, it cannot adopt a new designation without following the same procedure, as the D.C. Circuit has repeatedly concluded.[12]

2. Neutrality Rules Bar Ericsson from Serving as LNPA: Ericsson does not contest that, under the criteria laid out in Section 4.2.2 of the 1997 Report, Ericsson and its affiliates are barred from serving as LNPA because it is a telecommunications network equipment manufacturer. Ericsson therefore is not neutral. Rather than address the substance of the neutrality issue, Ericsson argues that the neutrality criteria contained in the 1997 Report were "part of a historical recitation," and not an aspect of the recommendations incorporated by reference into 47 C.F.R. § 52.26(a). To the contrary, the Commission's rules incorporate the entirety of the 1997 Report, except Appendix D, into 47 C.F.R. § 52.26(a). And the 1997 Report expressly states that "imposition of neutrality requirements" is a "crucial element" of vendor selection.[13] Section 52.26(a), by its terms, incorporates the 1997 Report and mandates neutrality.

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[10] *See* May 6 Ex Parte, at 3-4.

[11] *See id.* at 5 n.23.

[12] *See id.* at 4-5 n.20.

[13] 1997 Report § 4.2.2.

Ericsson claims that only items in the 1997 Report specifically labeled "recommendations" became part of the rule through incorporation, but even if that were the case – and it is not – that would not help Ericsson. Section 6 of the 1997 Report expressly includes the "[r]ecommendation" that the Commission "adopt[] . . . the *process* used to make LNPA vendor selections … discussed in Section 4."[14] Accordingly, selection of a vendor that does not comply with the mandatory neutrality requirements "described and justified in Section 4" (namely a manufacturer of telecommunications network equipment or its affiliate) would be directly contrary to governing Commission rules.[15]

The prohibition on a telecommunications network equipment manufacturer serving as LNPA, moreover, makes perfect sense. Ericsson is heavily dependent on revenues from a few large wireless providers – including at least one U.S. wireless carrier, whose network Ericsson manages.[16] Ericsson has a strong incentive to favor the interests of its large customers, and it is far-fetched to argue that Ericsson would risk the goodwill of its core business customers by putting "neutrality" concerns first. The neutrality rule ensures that the LNPA not have any incentive or ability to distort the competitive playing field by favoring its equipment customers in the provision of LNPA services. Even the perception that an equipment manufacturer/LNPA might play favorites is sufficient to undermine confidence among other carriers and the public that LNPA administration is truly neutral. That same recognition led the LLCs, in 1997, to bar network equipment manufacturers *and* their affiliates from becoming the LNPA. The Commission properly adopted that same categorical prohibition in 47 C.F.R. § 52.26(a).[17]

In an attempt to avoid the prohibition on telecommunications network equipment manufacturers in the rule, Ericsson incorrectly asserts that the neutrality requirements for the LNPA are exclusively set out in 47 C.F.R. § 52.21(k), which defines the LNPA as "an independent, non-governmental entity, not aligned with any particular telecommunications industry segment." Ericsson is incorrect given the language in 47 C.F.R. § 52.26(a). In any case, this reading hardly solves Ericsson's problem. Given its long and extensive involvement with the wireless communications industry, including its full management of at least one

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[14] *See id.* §§ 6.4.4. (emphasis added), 6.4.5. Furthermore, section 6 of the 1997 Report is titled "LNPA Selection Working Group Recommendations."

[15] *See id.* § 6.2.5. The 1997 Report specifically calls out the fact that all regions relied on "[i]dentical or substantially similar neutrality requirements." *Id.* § 4.2.2.

[16] Participants in the strongly competitive wireless market in the U.S. invest an estimated $5.3 billion a year on advertising, primarily for customer acquisition and retention. Advertising Age Marketing Fact Book 2014 at 10. In that environment, even a small incremental advantage may have significant competitive impact.

[17] *See* Letter from Aaron M. Panner to Marlene H. Dortch, Secretary, FCC, CC Docket No. 95-116, WC Docket No. 07-149, WC Docket No. 09-109, at 3 (filed Sept. 11, 2012).

carrier's network, Ericsson cannot credibly claim that it is "not aligned with any particular industry segment." To the contrary, Ericsson is the very embodiment of the alignment that the Commission's definition of LNPA seeks to prevent.

Finally, Ericsson also suggests that Neustar is somehow barred from relying on the terms of the Commission's existing rules because it failed to raise sufficient objections to the neutrality requirements in the RFP documents. That argument is nonsense. The Commission's neutrality rules are binding. The neutrality requirements contained in the RFP might apply for purposes of the industry's evaluation, but they could not displace the Commission's rules. Moreover, at *Ericsson's* urging, the terms of the RFP were altered so that evaluation of vendor neutrality was not part of the NAPM/NANC process and was instead reserved to *post*-recommendation proceedings before the Commission. The changes to the RFP eliminated NAPM evaluation of neutrality in the first instance – notwithstanding the expressed preference of the NAPM to conduct such a review. The Commission must now evaluate the neutrality of any potential LNPA pursuant to an NPRM proceeding that allows entities that might be adversely affected by an LNPA's lack of neutrality to have their concerns considered and addressed.

3. The Public Interest Will Be Served Only by a Fully Informed Process: Ericsson has offered no coherent explanation as to how bypassing the requirement to issue an NPRM would be in the public interest. Given the importance of the LNPA selection decision for the operation and development of the nation's telecommunications infrastructure, all interested stakeholders – small service providers, the public safety and national security communities, consumer groups, and state regulators – should have a full opportunity to address the NANC's recommendation. In particular, carriers, which necessarily must share their most sensitive competitive information with the LNPA and thus must have confidence that their information will be protected and not shared with rivals, should have the right to comment fully on the neutrality of a prospective LNPA vendor.

Neustar is prepared to work with the Commission to ensure that the public comment process is thorough, productive, and expeditious.

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Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, a copy of this letter is being filed via ECFS. If you have any questions, please do not hesitate to contact me.

Sincerely,

Aaron M. Panner by EYP

Aaron M. Panner

cc: Julie Veach
Jonathan Sallet
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